

CATHERINE CORTEZ MASTO
Attorney General
CAMERON P. VANDENBERG
Deputy Attorney General
Nevada Bar Number 4356
5420 Kietzke Lane, Suite 202
Reno, Nevada 89511
(775) 688-1815

*Attorneys for State of Nevada
Department of Public Safety Defendants*

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA**

MATT MOONIN, DONN YARNALL, and ERIK
LEE,

Plaintiffs,

v.

STATE OF NEVADA, *et al.*,

Defendants.

Case No. 3:12-cv-00353-LRH-(VPC)

**DEFENDANTS' RESPONSE TO
PLAINTIFFS' MOTION FOR LEAVE TO
FILE SECOND AMENDED COMPLAINT
AND JURY DEMAND**

KEVIN TICE and LUIS ZAPATA, the two remaining Defendants in this case¹, by and through counsel, CATHERINE CORTEZ MASTO, Attorney General, and CAMERON P. VANDENBERG, Deputy Attorney General, hereby submit their response to Plaintiff's Motion for Leave to File Second Amended Complaint and Jury Demand. This response is made and based on the Memorandum of Points and Authorities and all papers and pleadings on file in this action.

MEMORANDUM OF POINTS AND AUTHORITIES

This action commenced approximately two years ago with the filing of a 104-page complaint (Doc. #1) containing 13 claims for relief, 11 of which were lodged against 20 named Nevada Department of Public Safety (DPS) Defendants, including Kevin Tice and Luis Zapata. A Motion for Judgment on the Pleadings (Doc. # 38) was filed by the DPS

¹ See Order (doc. #129) entered January 17, 2014, wherein the Court dismissed all of Plaintiffs' claims with prejudice except for a First Amendment claim against Tice and a trespass claim against Zapata.

1 Defendants on September 17, 2012. In its April 15, 2013, Order (Doc. #100), the Court
2 granted in part and denied in part the motion, and allowed Plaintiffs 20 days to file an
3 amended complaint. The claims against the DPS Defendants that survived were Plaintiffs'
4 First Amendment claim against Tice, three defamation claims against Defendants Chris Perry,
5 Jim Peterson, and Dave Lewis, and Plaintiff Lee's trespass claim against Zapata. The Court
6 ruled that Defendant State of Nevada *ex rel.*, its DPS (and the Nevada Highway Patrol
7 ("NHP")) is immune from suit, and that Defendant Jackson is entitled to qualified immunity.

8 Plaintiffs filed a first amended complaint (FAC) (Doc. #101) on May 3, 2013. The FAC
9 lodged ten claims, three of which were new, against the DPS Defendants, including NHP and
10 Jackson, who had been determined by the Court to be immune from suit in its previous Order
11 (Doc. #100). Plaintiffs did not re-allege their defamation claims against Perry, Peterson, and
12 Lewis. Rather, they asserted a claim for hostile work environment based largely on the same
13 facts on which their defamation claims were based. In its January 17, 2014, Order (Doc.
14 #129), the Court dismissed all of Plaintiffs' claims with prejudice, except for a First
15 Amendment prior restraint claim against Tice and a trespass claim against Zapata. The Court
16 specifically noted that Plaintiffs had not re-alleged their defamation claims, and found "that
17 Plaintiffs have unduly delayed amendment by failing to diligently cure the deficiencies which
18 the Court previously identified." Further, the Court denied Plaintiffs' request for leave to
19 amend.

20 Two years have elapsed since this action was commenced. During that time,
21 Defendants have worked tirelessly to respond to the considerable pleadings filed by the
22 Plaintiffs and have succeeded, twice, in substantially reducing the claims and Defendants.
23 Plaintiffs now seek leave to file and serve a second amended complaint ("SAC") to re-assert
24 the defamation claims they contend were "inadvertently omitted" in the FAC they filed well
25 over a year ago. Plaintiffs offer no reason whatsoever for the delay in seeking leave to
26 amend. As mentioned above, the Court pointed out the omission in its Order, and Plaintiffs
27 did nothing about it for seven months. The delay here is undue. See, e.g., *Alzheimer's*
28 *Institute of America v. Elan Corp. PLC*, 274 F.R.D. 272, 277 (N.D.Cal. 2011). The Court has

1 already determined once before that Plaintiffs have unduly delayed amendment by failing to
2 cure the deficiencies the Court identified. No further delay should be permitted, and leave to
3 amend should, again, be denied. Defendants should not be prejudiced by continually having
4 to duplicate their efforts and incur needless additional expenses in responding to Plaintiffs'
5 claims.

6 **CONCLUSION**

7 Defendants respectfully request that the court deny Plaintiffs' Motion for Leave to File
8 and Serve a Second Amended Complaint and that the Court refer this matter to the Early
9 Neutral Evaluation Program to explore possible resolution of the First Amendment and
10 trespass claims.

11 Respectfully submitted this 27th day of August 2014.

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13 CATHERINE CORTEZ MASTO
Attorney General

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15 By: /s/ Cameron P. Vandenberg
16 CAMERON P. VANDENBERG
Deputy Attorney General
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the office of the Attorney General and is a person of such age and discretion as to be competent to serve papers.

That on August 27, 2014, she filed a true and accurate copy of the foregoing to the United States District Court CM/ECF Electronic Filing, who will e-serve the following addressees:

KENNETH J. MCKENNA, ESQ.
544 W. FIRST STREET
RENO, NV 89503
megan@kenmckennalaw.com
Attorney for Plaintiffs

/s/Tarah L. Goodlander

An Employee of the Office of the
Attorney General